No. 89-624



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

MAISLIN INDUSTRIES, U.S., INC., *et al.*,
*Petitioners,*

v.

PRIMARY STEEL, INC.,
*Respondent.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 16, 1989
CERTIORARI GRANTED JANUARY 16, 1990

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## SCHEDULE OF OMITTED MATERIAL

The following opinions, decisions and materials have been omitted in the printing of the Joint Appendix because they appear in the following pages in the Appendix to the printed Petition for Writ of Certiorari:





## UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

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**NO. 85-0021-CV-W-1**

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MAISLIN INDUSTRIES, U.S., INC., *et al.*,
*Plaintiff,*

v.

PRIMARY STEEL, INC.,
*Defendant.*

## RELEVANT DOCKET ENTRIES

| | 1985 |
|---|---|
| Complaint, filed. | January 8 |
| Answer, filed. | March 27 |
| Defendant's Motion to Refer Issues and Controversy to Interstate Commerce Commission with brief, filed. | April 2 |
| Plaintiff's Opposition to motion to refer, filed. | May 3 |
| Defendant's Reply to plaintiff's opposition to referral, filed. | July 31 |
| Plaintiff's Motion with brief to supplement opposition to referral, filed. | August 1 |
| Defendant's Reply to plaintiff's supplemental brief in opposition to referral, filed. | August 12 |
| Order entered staying proceeding and referring issues to ICC. | September 3 |

| | |
|---|---|
| | 1988 |
| Defendant's Motion for Summary Judgment with brief and appendices including ICC record, filed. | April 8 |
| Plaintiff's Cross Motion for Summary Judgment with brief, filed. | May 11 |
| Defendant's Response and Brief in Opposition to plaintiff's cross motion for summary judgment, filed. | June 17 |
| Defendant's Supplemental Brief in Opposition to plaintiff's cross motion for summary judgment, filed. | July 14 |
| Memorandum, Order, and Judgment entered lifting stay, denying plaintiff's motion for summary judgment and granting summary judgment to defendant. (705 F.Supp. 1401 (W.D.Mo. 1988)). | July 22 |
| Plaintiff's Notice of Appeal, filed. | August 19 |



**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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**NO. 88-2267 WM**

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MAISLIN INDUSTRIES, U.S., INC., *et al.*

v.

PRIMARY STEEL, INC.

**RELEVANT DOCKET ENTRIES**

| | |
|---|---|
| | 1988 |
| Appeal docketed. | August 25 |
| Brief of Appellant, filed. | October 17 |
| Addendum to Appellant's Brief, filed. | October 21 |
| Brief of Appellee, filed. | November 18 |
| Motion of Interstate Commerce Commission and United States to intervene with brief, filed. | November 21 |
| Appellant's Opposition to intervention, filed. | November 25 |
| Reply Brief of Appellant, filed. | December 5 |
| | 1989 |
| Order entered granting ICC leave to intervene and participate in oral argument. | January 3 |

| | |
|---|---|
| Oral argument held. | January 11 |
| Opinion and Judgment entered affirming district court judgment (879 F.2d 400 (8th Cir. 1989)). | July 17 |



**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION**

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**No. 85-0021-CV-W-1**

---

MAISLIN INDUSTRIES, U.S., INC., *et al.*,
*Plaintiff,*

vs.

PRIMARY STEEL, INC.,
*Defendant.*

FILED
SEP 3 1985
R.F. Connor, Clk.
U.S. District Court
West District
of Missouri

**ORDER**

This case pends on defendant's motion to refer issues and controversy to the Interstate Commerce Commission (ICC) for determination. The plaintiffs filed their complaint on January 8, 1985 to collect the balance due on defendant's freight bills. Defendant filed an answer on March 27, 1985 raising thirteen defenses. Defendant filed a verified complaint with the ICC on March 22, 1985. The ICC proceeding has been stayed pending the ruling of defendant's motion to refer issues and controversy to the ICC filed April 2, 1985. The parties sought a stay of action in this Court until August 1, 1985 to allow the discussion and evaluation of settlement possibilities. Plaintiffs supplemented their opposition to the pending motion on August 1, 1985. Defendant replied to that supplementation on August 12, 1985. Discovery has been stayed to this

point and the motion is now in a posture for ruling. We have considered the suggestions filed in support of and in opposition to the motion. We conclude that the motion should be granted.

I.

A.

Defendants contend *inter alia* that the freight charges should be found inapplicable or unlawful because "(1) the freight rates and charges sought to be applied by [plaintiffs] are unreasonable, unlawful and unjust in violation of 49 U.S.C. § 10701(a); (2) the [plaintiffs'] practice of assessing and rebilling the [defendant] higher freight rates and charges than those originally quoted by [plaintiffs], agreed upon by the parties, confirmed in writing and billed by the [plaintiffs], constitutes an unreasonable, unlawful, unfair and deceptive practice in violation of 49 U.S.C. §§ 10701(a) and 10761; and (3) the tariff items containing the freight rates and charges sought to be assessed by the [plaintiffs] are not the applicable sections of the said tariffs, and the freight rates and charges in the said tariff sections, if applied, would violate 49 U.S.C. §§ 10761 and 10762 and the ICC's regulations thereunder." (Verified Complaint, p. 3). We conclude that these are issues more properly addressed by the ICC.

B.

The doctrine of primary jurisdiction is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. It comes into play when enforcement of a claim originally cognizable in the courts requires the resolution of issues which have been placed within the special competence of an administrative body. Judicial process should be suspended pending referral of those issues to the administrative body for its views. *United States v. Western Pacific RR*, 352 U.S. 59, 63-64 (1956).



There are two factors in the principle: (1) uniformity and consistency in the regulation of businesses entrusted to a particular agency, and (2) utilization of an agency's specialized knowledge and insight gained through experience and more flexible procedures to ascertain or interpret the circumstances underlying legal issues. *United States v. Western Pacific, supra*, 352 U.S. at 64-65; *Nader v. Allegheny Airlines*, 426 U.S. 290, 303-304 (1976); *Iowa Beef Processors v. Illinois Central Gulf RR*, 685 F.2d 255, 259 (8th Cir. 1982).

The doctrine has been applied, for example, when an action otherwise within the jurisdiction of the court raises a question of the validity of a rate or practice included in a tariff filed with an agency and where the action turns on a determination of the reasonableness of a challenged practice. *Nader, supra*, 426 U.S. at 304-5. The doctrine requires the court to refer the matter to the ICC where "the claim presented to the court requires an inquiry into the lawfulness of a carrier's practice." *Iowa Beef Processors, supra*, 685 F.2d at 261.

II.

Plaintiffs have not designated which tariffs are applicable, but have stated the amount they assert is due. The defendant maintains that plaintiffs are applying an incorrect tariff. The ICC has the special competence and expertise to determine the appropriate tariffs to apply.

Defendant contends that if the plaintiffs have designated the appropriate tariff, it is unreasonable. The appropriate rate is a function of the reasons for the tariff as set by the ICC and whether they apply to the particular cargo. The ICC can order a waiver of the applicable tariff in a particular situation and yet maintain a consistent national practice without encouraging intentional discriminatory

rate "misquotes." *See Buckeye Cellulose Corp. v. Louisville & Nashville RR*, ICC Docket, No. 37635, decision served April 2, 1985. It is appropriate that we defer to the special expertise, competence, and administrative discretion possessed by the ICC.

The defendant challenges the practices of plaintiffs resulting in the alleged underpayment. It urges that the process be found to constitute an unreasonable, unlawful, and deceptive practice in violation of 49 U.S.C. § 10701(a) and 10761. There is an indication that the ICC is investigating similar complaints at present. *See Atlas Foundry & Machine Co. v. IML Freight, Inc.*, ICC Docket, No. MC-C-10942, decision served May 16, 1985. Such a policy decision should be dealt with uniformly and with reference to the underlying reasons and policies for the regulations. It is again appropriate that we defer to the expertise and administrative discretion possessed by the ICC.

Accordingly, it is

ORDERED (1) that the defendant's motion to refer issues and controversy to the Interstate Commerce Commission (ICC) for determination should be and is hereby granted. It is further

ORDERED (2) that the proceeding in this Court should be and is hereby stayed pending a final determination by the ICC. The Clerk shall remove this case from this Court's active docket until further order of Court.

/s/ John W. Oliver
John W. Oliver
Senior Judge

Kansas City, Missouri
September 3, 1985



**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION**

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**Civil Action No. 85-0021-CW-W-1**

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MAISLIN INDUSTRIES, U.S., Inc., et al.,
*Debtor-In-Possession*
*Plaintiff*

v.

PRIMARY STEEL, INC.,
*Defendant*

**APPENDICES TO BRIEF FOR DEFENDANT IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Attached hereto are the Appendices referred to in the Brief For Defendant In Support Of Defendant's Motion For Summary Judgment.

| Appendix | Title |
|---|---|
| • • • | |
| 3 | *NITL-Petition To Institute Rulemaking On Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986) |
| • • • | |

Respectfully submitted,

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## APPENDIX 3

EX PARTE NO. MC-177

## NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE—PETITION TO INSTITUTE RULEMAKING ON NEGOTIATED MOTOR COMMON CARRIER RATES

*Decided October 14, 1986*

The Commission has adopted a policy statement holding that, in the post-Motor Carrier Act of 1980 environment, the filed rate doctrine does not necessarily bar equitable defenses. Where an undercharge claim is filed by a carrier in court based on a tariff rate and the shipper claims that a lower, negotiated but unpublished rate was understood, if the court refers the case to the Commission for determination of the availability of equitable relief, the Commission will decide whether, under all the relevant circumstances, collection of the undercharges would be an unreasonable practice. A proposal to adopt a rule declaring a negotiated (but unpublished) motor carrier rate to be the maximum reasonable rate "if the shipper acted with a good faith belief that the negotiated rate was the legally applicable rate" is denied.

DECISION

BY THE COMMISSION:

BACKGROUND

Under 49 U.S.C. §10761(a), a motor common carrier must collect the rate published in its tariff. However, over the past few years, it appears that a significant number of motor common carriers have quoted lower rates that are not in the tariff and billed the shippers at those rates. Then, at a later date (often much later), the carrier or,

in many instances, the trustee in bankruptcy would bill the shipper for the difference between the tariff rate and the previously-agreed upon rate that had been paid. The justification given for this billing is that it is necessary to comply with section 10761. Obviously, the shippers believe that the carriers are treating them unfairly.

We issued an advance notice of proposed rulemaking (ANPR) [50 *Fed. Reg.* 37391 (1985)] in response to a petition filed by the National Industrial Transportation League (NITL). The ANPR invited public comment on a rule proposed by NITL[1] that would declare a negotiated (but unpublished) motor common carrier rate to be the maximum reasonable rate "if the shipper acted with a good faith belief that the negotiated rate was the legally applicable rate." Comments were requested on whether the Commission should adopt a rule similar to the one proposed by NITL or adopt a more appropriate alternative. Comments were also requested on whether the Commission has jurisdiction to adopt such a rule.

More than 100 separate comments were received.[2] Shippers, and shipper associations generally agree that quoting but not publishing rates is happening too often in the motor common carrier industry, and favor adoption of the rule proposed by NITL. Carriers, carrier associations, rate

[1] NITL's proposed rule states:

> Where a motor common carrier and shipper have negotiated and agreed upon a specific rate for particular traffic, and the carrier has failed to file the rate in tariff form with the Commission, the negotiated rate is the maximum reasonable rate which may be charged by the carrier for all shipments which have been tendered by the shipper to the carrier to be transported under the negotiated rate if the shipper acted with a good faith belief that the negotiated rate was the legally applicable rate.

[2] On February 5, 1986, Cooper Industries, Inc. filed a motion to file comments out of time. Under 49 C.F.R. §1110.5, we will accept Cooper's comments.



bureaus, and several trustees in bankruptcy, among others, generally oppose any Commission action in this area. Some parties believe that, while a rule in this area is necessary, the rule proposed by NITL should not be adopted without change.

On May 8, 1986, we held an open voting conference on the NITL proposal. We voted to adopt a policy statement announcing that, in light of the Motor Carrier Act of 1980 the filed rate doctrine does not necessarily bar equitable defenses and advising that, if a case is referred to the Commission, we will decide if the collection of undercharges would be an unreasonable practice.

## Preliminary Matter

On June 12, 1986, as supplemented July 7, 1986, Carrier Credit and Collection (CCC) filed a petition requesting reopening on the present record so that the Commission could reconsider, due to changed circumstances and material error, its decision to adopt the policy statement announced at the May 8, 1986 voting conference.[3] CCC argues that the Commission's policy statement conflicts with the recent decisions in *Square D Co. v. Niagara Frontier Traffic Bureau*, 476 U.S. ___ (1986), (*Square D*)[4] and *Regular Common Carrier Conference, et al, v. United States,*

[3] By notice published at 50 *Fed. Reg.* 26956, (1986), the Commission granted a petition filed by the National Retail Merchants Association requesting an extension of time to reply to CCC's petition. Several replies to CCC's petition to reopen were filed.

[4] The case involved a private antitrust action based on ICC filed tariff rates allegedly fixed pursuant to an agreement forbidden by the Sherman Act. The Court held that the carriers were not subject to treble damages liability. The Court affirmed the rule of *Keogh* v. *Chicago & Northwestern R-Co.*, 260 U. S. 156 (1922), which held that an award of treble damages is not an available remedy for a private shipper claiming that the rate submitted to, and approved by, the ICC was the product of an antitrust violation. It found that Congress, not the courts, was the appropriate body to change the law.

*et al.*, 793 F.2d 376 (D.C. Cir. 1986)[5] Because of the importance of the issues presented by CCC, pursuant to 49 C.F.R. §1110.5 we will treat CCC's petition and the replies thereto as late-filed comments, and consider them. However, as discussed below, neither *Square D* nor the *Regular Common Carrier* case preclude us from adopting this policy statement. Thus, CCC's petition to reopen is denied.

## Discussion and Conclusions

Many of the parties question our authority to adopt the NITL's proposed rule. The carriers, carrier associations, and rate bureaus argue that the Commission may not adopt NITL's proposal because: (1) carrier rates must be on file to be valid under 49 U.S.C. §10762; and (2) the rule is tantamount to a class exemption from the requirement that common carriers charge only the rates contained in a tariff that is in effect, and thus would abrogate 49 U.S.C. §10761(a)[6] and 11903 (which subject carriers and shippers to criminal sanctions for failure to observe the filed rate). These parties also contend that the proposal exceeds the Commission's authority over these claims, because the Commission lacks initial jurisdiction over rate reparation and collection actions and that, while a shipper might have a cause of action against an unreasonable or unlawful practice, the Commission has no authority to award damages. Only the courts can grant a remedy.

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[5] The court held there that a particular ("average rate") tariff did not produce a "filed rate" and thus did not comply with the requirement in Section 10761 that rates be "contained in a tariff." 793 F.2d at 379-380.

[6] Section 10761(a) provides that:

> Except as provided [in the Interstate Commerce Act] a carrier providing transportation • • • shall provide that transportation • • • only if the rate • • • is contained in a tariff that is in effect [under 49 U.S.C. 10761, *et seq.*] That carrier may not charge or receive a different compensation for that transportation • • • than the rate specified in the tariff • • •



Various shippers and shipper associations argue that 49 U.S.C. §10701(a),[7] together with 49 U.S.C. §§10101(b), 10321, and 10704, form an adequate basis for the rule. They rely on the few rail cases where the Commission has recognized equitable defenses in tariff applicability cases, *e.g., Buckeye Cellulose Corp. v. L & N R.R. Co.*, 1 I.C.C. 2d 767 (1985) (*Buckeye*), *aff'd. sub. nom., Seaboard System R.R. Inc. v. United States*, 794 F.2d 635 (11th Cir. 1986) (*Seaboard*). These parties contend that the rule would not abrogate section 10761 because tariff rates would still apply to the traffic they were intended to cover. Further, they stress that, although motor carrier undercharge cases must be filed in court, 49 U.S.C. §11706, the courts can refer the question of whether a motor carrier practice in fact violates the Act to the Commission, under the doctrine of primary jurisdiction.

We agree with the carrier interests that we lack authority to adopt the particular rule proposed by NITL. The proposed rule would abrogate the requirement in section 10761 that carriers charge only the tariff rate. While we have recognized equitable defenses to the application of tariff rates in appropriate cases such as *Buckeye*, adoption of NITL's rule would essentially nullify section 10761 whenever a shipper and motor common carrier negotiate rates.[8] Under the proposal, the negotiated rate, rather than the tariff rate would apply *unless* the Commission determined that the shipper lacked a good faith belief that the negotiated rate was legally applicable. The rule is virtually a *per se* determination that, as a matter of law, the ne-

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[7] Section 10701(a) provides:

> A rate (other than a rail rate), classification, rule or practice • • • provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission • • • must be reasonable.

[8] Even the shippers favoring the NITL proposal characterize it as creating a rebuttable presumption that the negotiated rate would apply.

gotiated rate would apply and is, thus, in direct conflict with the statute.

In addition, as some parties point out, the Commission does not have jurisdiction over claims challenging the reasonableness of motor carrier rates charged in the past nor authority to order the waiver of undercharges. We address the question of what rates should have been charged by a carrier only in an advisory capacity upon referral from a court. For these reasons, we will not adopt NITL's proposal.

While we conclude that NITL's specific proposal conflicts with the requirements of section 10761 and the long-standing judicial construction of those requirements,[9] the policy statement we adopt instead is both justified and within our jurisdiction. Contrary to the carriers' concerns about the NITL proposal, this policy statement does not abrogate Section 10761. *Seaboard, supra*, 794 F.2d at 638. *See Nepera Chemical, Inc. v. Sea-Land Service*, 794 F.2d 688, 693 (D.C. Cir. 1986). Rather, we emphasize that carriers must continue to charge the tariff rate, as provided in the statute. The issue here is simply whether we have the authority to consider all the circumstances surrounding an undercharge suit.

The recent *Seaboard* decision confirms that Section 10701(a) (which applies to motor as well as rail carriers) and Section 10704 gives us the authority to make this determination. Although Section 10761 requires that carriers must charge the tariff rate, "[t]he statute does *not* say what remedy is available if less than the tariff rate has in fact been charged and paid for past shipments" (emphasis added). *Seaboard* at 638. Moreover, while the

[9] In the past, ignorance or misquotation of rates generally was not an excuse for paying less than the tariff rate. *See, e.g., Southern Pacific Transp. Co., v. Commercial Metals*, 456 U.S. 336 (1982); *Louisville & Nashville* v. *Maxwell*, 237 U.S. 94, 97 (1915); *A. J. Poor*, v. *Chicago B.I.O.*, 12 I. C. C. 418 (1907).



Interstate Commerce Act still embodies the policy of nondiscrimination, "[t]the primary authority to give effect to [that policy] * * * is reposed in the ICC." *Id.* In short, nothing prohibits us from reexamining the statute and announcing that, in the future, the tariff rate filed by motor carriers need not and should not be applied automatically in the limited circumstances covered by our policy statement.[10]

In particular circumstances it could be fundamentally unfair not to consider a shipper's equitable defenses to a claim for undercharges.[11] In our view, the filed rate doctrine was not intended to condone or reward carriers in the circumstances involved here, especially where carrier actions may constitute fradulent business practices.[12]

[10] The courts consistently have recognized our authority to reinterpret the statute and "adapt [our] rules and practices to the nation's needs in a volatile changing economy." *See, e.g., American Trucking v. A.T.S.F.R. Co.*, 387 U.S. 397, 416 (1967); *Seaboard, supra; Western Coal Traffic League v. United States*, 719 F.2d 772 (5th Cir. 1983) (en banc) *cert. denied*, 104 S. Ct. 2160 (1984); *Nueces County Navigation District No. 1 v. ICC*, 674 F.2d 1055 (5th Cir. 1982), *cert. denied*, 503 U.S. 206 (1983).

Similarly, our authority to address both equity and policy considerations in fashioning appropriate remedies has been recognized for years. *See ICC v. ATA*, 104 S. Ct. 2458 (1984); *Atchison, T.S.F.R. Co. v. Wichita Board of Trade*, 412 U.S. 800, 823-24 (1973); *National Insulation Transp. Committee v. ICC*, 683 F.2d 533, 540-44 (D.C. Cir. 1982); *Genstar Chemical Ltd.* v. *ICC*, 665 F.2d 1304 (D.C. Cir. 1981), *cert. denied*, 456 U. S. 905 (1982).

[11] We did not intend *Atlas Foundry & Machine Co, v. IML Freight, Inc.* (not printed), decided April 17, 1985, to be read as a wholesale refusal on our part to consider the situations involved here as unreasonable practices.

[12] The fact that the courts historically have refused to consider equitable defenses does not preclude our adopting this policy statement. *Seaboard, supra*, 794 F.2d at 638. As the court in *Seaboard* explained (*id.*), the courts have never held that the Commission lacks authority to prohibit the unreasonable collection of undercharges. Moreover, the Commission had not waived undercharges in the cases precluding equitable defenses.

Today's regulatory environment makes it appropriate for us to take a fresh look at the proper regulatory response to the matter of unfiled negotiated motor carrier rates. The principle that the charges contained in an applicable tariff must be assessed regardless of any agreement between shipper and carrier arose during an era of strict entry and rate regulation. Requiring strict adherence to the tariff rate was intended to avoid intentional carrier misquotation of rates as a means to offer secret discounts to particular shippers. *See Western Transp. Co. v. Wilson*, 682 F.2d 1227, 1230 (7th Cir. 1982). In the strict regulatory environment prior to the Motor Carrier Act of 1980, Pub. L. No. 96-296 (MCA), carriers did not enjoy the flexibility they now enjoy to negotiate particularized rate arrangements with shippers. Consequently, they charged essentially the same rates for freight in a given traffic lane, and it generally was not difficult to ascertain the published rate. In that regulatory climate shippers rarely were excused from paying the published rate.

In *Buckeye, supra*, we modified this strict tariff applicability standard for rail carriers because the deregulated pricing atmosphere created in the Staggers Act and the particular facts of the case led us to conclude that a more flexible approach was necessary—and that carriers were unlikely to use rate misquotations as a means to discriminate in favor of particular shippers today. We found there that the railroad had engaged in an unreasonable practice under 49 U.S.C. §§10701(a)(1) and 10704(a)(1) because the meaning of the published tariff was not plain to the ordinary user, the applicable rate was misquoted over a long period of time, and the shipper relied, in good faith, on the misquoted rate. In *Seaboard, supra*, 794 F.2d at 638, the reviewing court affirmed exercise of our unreasonable practices jurisdiction in this context. It found (*id.*):

> The Interstate Commerce Act * * * still embodies the policies of nondiscrimination and uniformity. The primary authority to give effect to those policies, though, is reposed in the ICC. * * * The Commission in this case merely refused to allow the carrier to collect its undercharge when there was no evidence that the carrier intentionally or knowingly undercharged, when waiving the undercharges was unlikely to encourage carriers to indulge in intentional discriminatory rate misquotations, and when the shipper relied upon the carrier's continuing conduct in misleading the shipper as to the applicable rate under a confusing tariff. The Commission did not abolish the requirement of 49 U.S.C. §10761(a) that carriers must charge the tariff rate.



The policy statement we are here adopting will allow us to consider similar issues when raised by shippers using motor carriers. Indeed, as discussed below, this approach is even more compelling in the motor carrier area. Moreover, as we found in *Buckeye*, our former policy of penalizing shippers for carriers' mistakes regardless of the circumstances is unnecessary and inappropriate to deter discrimination under today's statutory scheme.

As noted earlier, the MCA dramatically altered the competitive atmosphere of the motor carrier industry. The relaxation of regulatory requirements and Commission oversight has resulted in intense, new competition. Thousands of carriers have entered the market with broad operating authority and increased pricing freedom. The new business atmosphere requires these carriers to price competitively and on extremely short notice if they are to retain existing traffic or quickly obtain new (including backhaul) traffic.

It is not entirely clear why the problem we are here addressing has developed. Some carriers argue that it is purely inadvertent that tariffs reflecting negotiated rates are not filed. Certain shippers believe the practice is intentional. Whatever the reason, the potential for this prob-

lem is significant. We are directed to encourage competitive, innovative, and individualized price and service options to meet changing market demand. 49 U.S.C. §10101(a)(2). As parties such as National Gypsum Co., et al. emphasize, hundreds, or even thousands, of individual motor common carrier rates are negotiated daily. In these circumstances, it can be extremely difficult for shippers to determine, prior to movement, whether the agreed rate is actually on file.

The question that we are addressing here is whether a shipper must pay the rate established in a tariff where a motor common carrier has negotiated a lower rate and has indicated that the negotiated rate would be the one charged (and therefore presumably filed as a tariff).[13] We believe, in the highly competitive motor carrier industry and economy in general, equitable defenses to rigid application of filed tariff rates should be available on a case-by-case basis and that our unreasonable practice jurisdiction authorizes such an approach.

In our view, an inflexible policy frustrates the intent of the NTP to encourage pricing innovation, since it could chill rate negotiation between shippers and carriers, and inhibit legitimate pricing initiatives. On the other hand, permitting equitable defenses in limited situations comports with the spirit of the MCA.

Furthermore, we are firmly convinced that our prior policy of applying Section 10761 strictly regardless of the circumstances is inappropriate and unnecessary to deter discrimination today. As the shippers point out, the variety of price and service options permitted under the MCA and

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[13] There is no comparable problem with rates negotiated with motor contract carriers because the rates do not have to be filed with the Commission in tariffs. *Exemption—MTR. Contr. Car.—Tariff Filing Requirements*, 133 M.C.C. 150 (1983), *aff'd Central & Southern Motor Freight Association* v. *United States*, 757 F.2d 301 (D.C. Cir. 1985), *cert. denied*, 54 U.S.L.W. 3392 (1985).



NTP permit activity that previously would have been considered discriminatory. *E.g., Rates for a Named Shipper*, 367 I.C.C. 959 (1984). Moreover, with the elimination of the prohibition against dual operations, a motor carrier not desiring to publish its rates can simply seek contract carrier authority. See *Exemption—MTR. Contr. Car.—Tariff Filing Requirements*, 133 M.C.C. 150 (1983), *aff'd Central & Southern Motor Freight Association* v. *United States*, 757 F.2d 301 (D.C. Cir. 1985), *cert. denied*, 54 U.S.L.W. 3392 (1985). Thus, changed circumstances clearly warrant a tempering of the former harsh rule of adhering to the tariff rate in virtually all cases. In short, as was the case in *Buckeye*, (*see, Seaboard, supra*, at 638): "the inability of a shipper to rely on a carrier's interpretation of a tariff is a greater evil than the remote possibility that a carrier might intentionally misquote an applicable tariff rate to discriminate illegally between shippers."

In response to carrier contentions that we are without jurisdiction to order waiver of motor carrier (as opposed to rail) undercharges, we now set out the rather limited nature of our role in motor carrier undercharge cases—and explain why it comports with the statutory scheme. As some parties point out, the Commission lacks initial jurisdiction to entertain challenges to the reasonableness of motor carrier rates charged in the past, or to order the waiver of undercharges. However, this does *not* mean that we lack authority to address the question of what rate should have been charged by a carrier (the tariff rate, the negotiated rate or some other rate) if the carrier brings an action for undercharges in district court, 49 U.S.C. §§11705(b)(3), 11706, and the court refers the question of whether the collection of undercharges would be an unreasonable practice to us under the doctrine of primary jurisdiction.[14] *Seaboard, supra*, 794 F.2d at 638; *Great*

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[14] Recently, in its order of June 11, 1986 in No. 83 Cov. 2803 (RJW), *International Distribution Centers, Inc.*, v. *Rhapsody Blouse and Sport-*

*Northern Ry. v. Merchants Elevator*, 259 U.S. 285, 291 (1927); *National Motor Freight Traffic Ass'n v. United States*, 268 F. Supp. 90, 92 (1967), *aff'd* 393 U.S. 18 (1968); *Western Transp. Co, v. Wilson, supra*, 682 F.2d at 1231-32. In the latter case, the Seventh Circuit held as pertinent here that we have authority to determine when motor carrier practices violate the Act, despite our inability to award reparations. In determining the question whether a motor carrier practice is unreasonable, the Commission will assume its traditional role in unreasonable practice cases, weighing the facts and circumstances in light of its experience and expertise, and aiding the court by making necessary administrative determinations. Consistent with the statutory scheme, the court retains its authority to set the remedy and accept or reject the Commission's conclusions.

In short, we offer to undertake an advisory analysis of whether a negotiated but unpublished rate existed, the circumstances surrounding assessment of the tariff rate, and any other pertinent facts.[15] We would, at a court's request, determine, based on all relevant circumstances, whether collection of undercharges based on the rate contained in the filed tariff would constitute an unreasonable practice and, if a negotiated rate is found to exist, whether this amount is all the carrier should be permitted to collect. The referring court would retain final authority to set the remedy, if any, and review our determination. Accordingly, as the NITL and others contend, the instant policy statement is consistent with the statutory scheme.

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*swear, Inc., Defendant and Third Party Plaintiff, and Gerald W. Eskow, Third Party Defendant*, the United States District Court for the Southern District of New York indicated that the Commission is not precluded from considering a shipper's equitable defenses in examining the question of whether a carrier's collection of undercharges is an unreasonable practice.

[15] We note that we performed similar analyses pursuant to Ex Parte No. 358-F, *Change of Policy-Railroad Contract Rates*.



As previously indicated, CCC argues that the recent decisions in *Square D* and *RCCC*, reaffirm the validity of the filed rate doctrine and therefore refute the Commission's new policy. It believes we must, therefore, reverse the policy adopted at the May 8th open conference. We do not view our new policy—which of course is firmly supported by the recent *Seaboard* court case—as inconsistent with those decisions. Neither *Square D* nor *RCCC* involved the question of equitable defenses to a claim for undercharges, and neither decision indicates that the Commission is precluded from passing on the reasonableness of carrier practices pursuant to its express statutory authority in §10701(a). Further, as discussed earlier, we are not abolishing the requirements of §10761. Thus, the portions of *Square D* reaffirming that carriers must *file* their rates do not mean that we lack authority to find, in a particular case, that allowing a carrier to *collect* the tariff rate would be unreasonable.

In implementing this policy statement case-by-case, we will resolve what the tariff rate is and then analyze, under our practices jurisdiction, whether collection of the tariff rate is a reasonable practice. Indeed, the Commission also supports the view expressed by some parties that carriers who engage in illegal behavior by intentionally disregarding the tariff filing requirements should be properly dealt with under the antitrust laws, and/or other punitive statutes.[16] *See Nepera Chemical, supra*, allowing a private damage action for negligence in applying for leave to refund and waive shipping charges where the carrier voluntarily represented that it would seek a specified rate correction. The Commission's intent in adopting this new policy is simply to make clear that the filed tariff rate need not and should not be applied automatically in the

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[16] In *Square D*, the Court made it clear that it was not holding the carriers harmless, but merely precluding a treble-damages antitrust action.

limited circumstances covered by our policy statement. Both the statute and the applicable case law permit us to take this action.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources. It is issued pursuant to 5 U.S.C. §553 and 49 U.S.C. §§10321, 10701(a), and 10704(b)(1).

*It is ordered*:

1. The petition filed on February 27, 1985, by the National Industrial Transportation League, is denied.

2. A policy statement, as described above, is adopted.

3. The petition to reopen filed by Carrier Credit and Collection is denied.

4. This proceeding is discontinued.

5. This decision is effective on November 29, 1986.

COMMISSIONER LAMBOLEY, commenting:

I support fully the concept that in the post-Motor Carrier Act of 1980 environment, the "filed-rate doctrine" does not necessarily bar equitable defenses. Indeed, our decision in No. 37635, *Buckeye Cellulose Corp.* v. *L & N R.R. Co.*, 1 I.C.C. 2d 767 (1985), *aff'd sub. nom., Seaboard System R.R. Inc. v. United States*, 794 F.2d 635 (11th Cir. 1986), recognized that the encouragement of market-based arrangements likewise requires us to consider the variety of situations that lead to new transportation price/service options.

In the course of negotiating and developing those new options there will be representations, inducements and reliance on the part of the respective parties. In this environment, there is reason to anticipate that certain problems of conduct and interpretation may arise, just as those which have prompted the general rule here requested by NITL.



Although our policy statement focuses on the questions framed by the petitions, the issues addressed here involve the broader elements of accountability, i.e., as people participate in the marketplace, their conduct may now be evaluated and potentially measured as to reasonableness of the practice.

In my view, this policy statement need not be confined to the case specific problems of negotiated rates and collection of undercharges in bankruptcy or other judicial settings. It likewise reaches the potential equitable considerations in various circumstances and the Commission's willingness to determine whether an unreasonable practice exists as a result of the relationship and conduct of the parties.

I do not believe court referral is an essential element to the exercise of our jurisdiction. In short, there is no reason in these cases to require referral before a party may petition for redress from alleged unreasonable practice(s). Cf. 49 U.S.C. §§11705(b)(3), 11706; *Informal Procedure for Determining Motor Carrier and Freight Forwarder Reparations*, 335 I.C.C. 403 (1969) (remedial focus on rates, reparations and waiver of undercharges.)

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre, and Lamboley. Commissioner Lamboley commented with a separate expression.